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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., AND JOHN Z., pseudonyms for actual persons,
Petitioners,

-v-

FRANK J. KELLY, Attorney General for the State of Michigan, and WILLIAM L. CAHALAN, Wayne County Prosecutor,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT WILLIAM L. CAHALAN, WAYNE COUNTY PROSECUTOR

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JURISDICTION

Respondent disagrees with Petitioners' statement of jurisdiction. Since the matter involves the constitutionality of a state statute attacked and upheld by the state courts, jurisdiction is by **appeal** under 28 USC 1257 (2), and not by certiorari under 28 USC 1257 (3).

REASONS FOR DENYING THE WRIT

NO PROVISION OF THE UNITED STATES CONSTITUTION CREATES A LEGALLY COGNIZABLE PROPERTY INTEREST IN A BABY ON THE PART OF THE NATURAL MOTHER OR FATHER.

Citing numerous cases from this Court, e.g. **Roe v Wade,** 410 US 113 (1979); **Griswold v Connecticut,** 381 US 479 (1965); **Eisenstadt v Baird,** 405 US 438 (1972); and **Carey v Population Services International,** 431 US 678 (1977), petitioners contend that MCL 710.54, which prohibits the offering, giving, or receiving of money or any other consideration in connection with the placing of a child for adoption, the registration or communication of the existence of a person interested in adopting a child, or obtaining a release, consent, or petition (with a criminal penalty for violation, MCL 710.69), is "inconsistent with the decisions of this Court defining the scope of the constitutionally protected right of privacy." An examination of these cases demonstrates that in citing them in support of their position petitioners are grievously wounded in the house of their friends.

The crux of petitioners position lies in the claim that the zone of marital privacy recognized by this Court as existing within the concept of liberty as embodied in the due process clause of the Fourteenth Amendment includes a right for a natural father (as an artificial insemination donor) and his spouse to purchase from the natural mother her legal rights to her child (and concommitantly a right in the natural mother to sell her interest in her child), so that the state may not interfere.[1] But the cases cited by Petitioners from this Court reveal that there is no such constitutionally recognized property right of natural mothers and fathers in unborn (and even unconceived) children.

[1]Respondent does not wish to be understood as agreeing that the Fourteenth Amendment creates any substantive rights which are immune from regulation by the state, be they rights of privacy or rights to life or property. Indeed, respondent marvels that it can be said that there exist "zone of privacy" liberty interests which the state may not impair (e.g. the "right" to abortion after the first trimester) while at the same time a person's **most** fundamental right, his right to life, **may** be taken by the state so long as the process given is that which is due (a fair trial) and the law does not offend a specific guarantee of the Constitution—the Eighth Amendment. Were this Court writing on a clean slate respondent would urge that the Fourteenth amendment does not prohibit the state from depriving an individual of **any** liberty interest, including his life, so long as the proper process (the "law of the land") is given. The state's power in this regard is limited by the police power concept; that is, certain conduct or interests are beyond regulation in falling without the police power of the state because no public interest can rationally be said to be involved. But any conduct subject to regulation under the police power of the state may be regulated under the Fourteenth Amendment, the question being the nature and quality of the process which is due in the particular circumstance.

The abortion decisions of this Court, Roe v Wade, supra; Doe v Bolton, 410 US 179 (1973); **Planned Parenthood of Missouri v Danforth,** 428 US 52 (1976); **Maher v Roe,** _____US_____, 65 LEd 2d 784 (1980); **Bellotti v Baird,** 443 US 622 (1979); **Harris v McRae,** _____US_____, 65 LEd 2d 784 (1980); **H.L. v Matheson,** _____US_____, 67 LEd 2d 388 (1981), clearly demonstrate that the concern of the Court, and the interest protected by the Fourteenth Amendment, is one of privacy regarding the **decisions** involved in conceiving, bearing, and raising a child. No property interest is involved; indeed, because the abortion decision is viewed as a privacy decision belonging to the mother, the natural father has **no rights whatever** in the decision to abort, let alone any property right. Nor is the right given the mother because of some cognizable property interest in the fetus/child, but because of the involvement of her own body in the biological process. Because petitioners seek to sell and buy legally recognizable **custodial** in-

terests of a mother and her child, and because there is no constitutionally protected property interest in children, petitioners attack on the statue must fail.

2. PETITIONERS' RIGHT OF PRIVACY TO CONCEIVE, BEAR, AND RAISE A CHILD DOES **NOT** INCLUDE A RIGHT TO PAY A FEE TO A NATURAL MOTHER IN EXCHANGE FOR HER CUSTODIAL RIGHTS IN HER CHILD.

Respondent disagrees with petitioners' **unfounded extension** of the right of privacy in family matters as recognized by this Court to include the **right** to use the public statutory adoption process but to pay a fee to the natural mother in exchange for her custodial rights in her child. The state clearly has the authority under its police power to establish the requirements for adoption. Adoption exists **only** by statute, and the object is to change the succession of property of persons dying intestate and create the relations of paternity. **In re Sessions' Estate,** 70 Mich 297 (1988). While contracts for the adoption of children are not considered as opposed to public policy, an adoption contract **cannot be enforced unless it complies with the laws of the state.** In **re Garlow's Estate,** 313 Mich 402 (1946); **Westbrook v Elder,** 464 Mich 138 (1933). Unless consent is obtained as required by statute, the adoption is invalid. **Slattery v Hartford-Connecticut Trust Company,** 254 Mich 671 (1931).

Petitioners' wish to invoke the statutory adoption process, but do not wish to comply with one of its requirements. Consequently they selectively attack one of its provisions, MCL 710.54, and its accompanying penal provision, MCL 710.69, as unconstitutional. Respondend submits that the statutory adoption code does not infringe on petitioners; rights to privacy in conceiving, bearing, and raising children. Clearly the petitioner natural mother, and the petitioner couple, are free to

conceive a child, bear it, and raise it as they agree among themselves because these acts are guaranteed by the right to privacy. What they **cannot** do is proceed to the **public forum of the courtroom** and use the public statutory process without complying with **all** the statutory requirements.

> In **Harris v McRae** this Court emphasized that although government may not place obstacles in the path of a woman's exercise of her freedom of choice, **it need not remove those not of its own creation.** Indigency falls in the latter category. (Empasis added). 65 LEd2d at 804.

Respondent suggests that infertility, also, is **not** of the state's creation, and the state, therefore, has no duty to rectify a woman's physical inability to have children. There is no fundamental right to **adopt** a child, nor to give up a child for adoption in exchange for a fee; these are not "liberty" interests protected by the due process clause of the Fourteenth Amendment. See **Harris v McRae,** 65 LEd2d at 805.

For this reason the "rational relationship" test applies, not the "compelling state interest" test, and the cases cited by petitioner are inapplicable.[2] If **any** rational relationship can be observed between the harm to the public sought to be cured and conduct proscribed, the legislation will be upheld by the courts. The legislation herein challenged easily passes the rational relationship test: There is a rational relationship between prohibiting a person from receiving any money or consideration beyond a reasonable recompense for fees and expenses incurred in giving up parental rights and assuring that the courts through the adoption process do not become a market for the production and placement of babies. **See Harris v McRae,** 65 LEd2d at 809.

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[2]But see footnote 1.

3. EVEN IF THE STRICTER COMPELLING STATE INTEREST IN EMPLOYED, THE STATE HAS A SUBSTANTIAL COMPELLING INTEREST WHICH OUTWEIGHS ANY FUNDAMENTAL RIGHTS POSSESSED BY PETITIONERS REGARDING THE STATUTORY ADOPTION PROCESS.

Although respondent maintains no fundamental right is involved, assuming arguendo this Court were to find petitioners did have some fundamental right to privacy which extended to their decision to employ the state's statutory adoption process, respondent contends that using the balancing test of **Roe v Wade, supra,** there is a compelling state interest which outweighs petitioners' rights to privacy.

The state has a duty to maintain the integrity of its court system. Adoption exists only by statute. Adoption falls within the authority of the probate court. It would destroy the integrity of the courts to allow a judge to rubber-stamp and enforce a private agreement for one party to give money or other consideration to a woman in order to have her conceive a child, give birth, and relinquish her parental rights. Petitioners seek to convince this court that the "surrogate" mother would act out of altruistic rather than pecuniary motives. If that were so, no monetary payment would be necessary, as under MCL 710.54 the mother could be reimbursed for fees and expenses. What petitioners seek is to provide her with a sum of money ($5,000) over and above the reasonable expenses she has incurred. Even if a portion of this money went for legitimate expenses unrecognized by MCL 710.54, the fact remains that the primary purpose of this money is to encourage women to volunteer to be "surrogate" mothers. Petitioners have initiated this lawsuit because few women would be willing to volunteer the use of their bodies for nine months if their only gain was the joy of making someone else happy by letting that couple adopt and raise her child. This, contrary to petitioners'

exhortations, in all but the rarest of situations, the money petitioners seek to pay the "surrogate" mother is intended as an inducement for her to conceive a child she would not otherwise wish to conceive, carry for nine months a child she would not normally wish to carry, give birth to a child she would not normally wish to give birth to, and then, because of the monetary regard, relinquish her parental rights to this child. Respondent contends that the blanket prohibition of MCL 710.54 is necessary to prevent the inducement of a woman to become a "surrogate" mother by leading her to believe she will receive a sum of money as agreed upon in a private agreement, only to be denied that amount by the judge at the adoption proceeding if he believes that money unjustified. The blanket prohibition prevents development of **any** market for the production of babies. Further, a state officer, a judge, should not be put in the position of determining what sum is reasonable as a **price** for custodial rights; the state's courts should not be setting or rubber-stamping the price of babies. It is not the court's business to determine that one child is worth more than another child and establish the reasonable rate for a child of a beautiful mother as opposed to a homely mother; for a child of an intelligent mother, as opposed to the child of a dim-witted mother; or for different genetic traits. The integrity of the court system of the statutory adoption process demands that the court be absolutely prohibted from engaging in this conduct.

Another compelling state interest is to protect women who, because of their poverty or other personal circumstances, would have their will to bear a child, or to keep a child they have borne, overcome by the inducement of money or other consideration.

A court might believe the best interests of the child are with its natural mother (despite a better economic status in the prospective adoptive couple), but agree to the adoption solely because of the natural mother's expressed rejection of parental rights (which results from the monetary inducement). It is not for the court in each separate case to determine the motivation for her deci-

sion, how much money it would take for that particular natural mother's will to be overborne, and whether her decision is "voluntary" or "involuntary." Since only recompense for reasonable fees and expenses incurred is permitted under MCL 710.54, it is relatively simple for the court to determine whether the natural mother is acting voluntarily in relinquishing her parental rights. Thus, the blanket prohibition greatly facilitates the court's determination of the best interests of the child by making it simpler to assess the natural mother's true feelings toward parenthood.

Although respondent has not exhausted the list of compelling reasons for justifying MCL 710.54 and 710.69, (and see brief of co-respondent), respondent believes the above stated reasons clearly establish compelling state interests in enacting these provisions which outweigh any privacy rights possessed by petitioner regarding the statutory adoption process.

4. MCL 710.54 and 710.69 DO NOT DENY EQUAL PROTECTION OF THE LAW.

The equal protection clause prohibits gender classifications in statutes unless the classification serves important governmental objectives and is substantially related to achievement of those objectives. **Personnel Administrator of Massachusetts v Feeney**, 442 US 256 (1979). The instant legislation applies to any "person" seeking to employ the state's adoption process. It does **not** classify according to gender. If the law is neutral on its face, as are MCL 710.54 and 710.69, the court must determine if the purpose can be traced to a historically discriminatory purpose. **Feeney, supra.** In **Feeny** the Supreme Court upheld veteran's preference statutes—neutral on their face—despite the fact that in practice those statutes discriminated against women because they were less likely to be veterans. It ruled that where nothing shows enactment to accomplish a collateral goal of gender discrimination, there is no constitutional violation because there is no purpose to discriminate on the basis of sex.

> Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. when the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. (Citation omitted). The calculus of effects, the manner in which a particular law reverberates in a society, is a **legislative and not a judicial responsibility.** 442 US at 271-272 (emphasis added)

There is no discriminatory purpose in the instant legislation. It applies **equally to everyone** to prohibit the offering, giving, or receiving of money or any consideration in connection with the statutory adoption process. See also **Harris v McRae,** 65 LEd2d at 808. Both the mother and the father have parental rights. See **Caban v Mohammed,** 441 US 380 (1979). **Neither** may receive money in connection with giving up their parental rights. If the practical effect is that the provision applies more often to one gender rather than the other, so be it. There is no constitutional denial of equal protection.

5. THE PETITION IS OUT OF TIME

Respondent adopts co-respondent's argument that the refiled petition is jurisdictionally out of time.

CONCLUSION

WHEREFORE, respondent requests that the petition be denied, or if treated as an appeal, the appeal be dismissed for want of substantial federal question.

Respectfully submitted

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